

CHAPTER 13 — SETTLEMENT AGREEMENTS (REINSTATEMENT AWARDS, COURT ORDERS, GRIEVANCES, ETC.)

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1300 Types of Awards

Improper terminations, disciplinary actions and wage disputes sometimes result in court orders, compromise settlements, or arbitration awards. For purposes of this chapter, all of these will be referenced as settlement agreements. These awards may grant the appellant reinstatement, restore benefits, provide for back wages and/or damages which may or may not be reportable earnings for WRS purposes.

Payments resulting from retroactive contract settlements to all eligible employees in a bargaining unit are not considered in this section. See Chapter 10 for reporting retroactive settlements.

1301 Statutory/Rule Basis

Wis. Stat. § 40.02 (22) (b) 9 excludes payments made under a court order or compromise settlement from consideration as WRS earnings, unless provided for by departmental rule.

Wis. Stat. § 40.25 (5) requires reestablishment of the WRS account of an employee reinstated as a result of a discharge appeal, who had taken a benefit following the disputed discharge.

Wisconsin Administrative Code ETF 10.01 (3t) defines “reinstate” for purposes of Wis. Stat. § 40.25 (5) as restoring an employee to the same position or a similar position with the same employer at the same level prior to the discharge. The termination will be expunged and the employee will be made whole.

Wisconsin Administrative Code ETF 20.12 establishes the conditions under which payments made as a remedy for employment dispute are considered WRS earnings.

1302 Requirements of an Acceptable Award

The effective date of the settlement agreement is the latest date signed by the parties involved. The following conditions apply to settlement agreements with an effective date on or after May 16, 1996. These conditions are summarized from Administrative Code ETF 20.12 and are meant as a reference tool. ETF will review the settlement agreements for compliance with ETF 20.12.

NOTE: Settlement agreements with an effective date prior to May 16, 1996 will be reviewed using statutes in effect at the time they were signed. Please contact the Employer Communication Center at (608) 264-7900 if your settlement agreement has an effective date prior to May 16, 1996.

IMPORTANT: ETF will not review and/or issue approvals on draft settlement agreements.

If the dispute involves fewer than 80 hours, a copy of the settlement agreement need not be submitted. Simply report the hours and earnings as a current or prior year adjustment as applicable. If settled in the current year you must include the earnings and hours on your annual report. If settled for a prior year, you must submit an appropriately coded transaction report (action code 22) to ETF.

All of the following conditions must be met in order for settlement agreements effective on or after May 16, 1996 to be considered acceptable:

- A. The payment must be one of the following:
 - Retroactive wages for an involuntary termination. The settlement agreement must also expunge the previous discharge date.
 - Retroactive wages for a period of involuntary suspension or unpaid leave of absence.
 - Additional wages for hours of service performed and previously reported to WRS.
 - Additional wages for service performed, but not previously reported to WRS.
- B. The employee or former employee must be living on the effective date of the settlement agreement.
- C. The settlement agreement is written, signed and dated by the issuing authority (court, personnel commission, etc.) or by the parties to the agreement.
- D. The settlement agreement must specify the wages to be paid to the employee for each annual earnings period (regardless of when it is taxable) and the associated hours of service performed by the employee or hours that would have been performed if the employee had not been suspended or terminated.

NOTE: For employment categories 5, 6, 7, 8, 10, 11 and 12, the annual earnings period is July 1 through June 30. For all other employment categories, the annual earnings period is January 1 through December 31.

- E. You must submit a copy of the settlement agreement along with an *Employee Transaction Report* (ET-2533). Report the wages and hours resulting from the settlement agreement using the instructions in Chapter 10. ETF may request additional payroll detail from you.

1303 Settlement Agreements for Disputed Terminations

In addition to the requirements defined in Subchapter 1302 for acceptable awards, if the settlement agreement pertains to a disputed termination the settlement must do ALL of the following:

- A. Rescind the termination date previously reported or establish a new termination date if the employee is not reinstated. The new termination date cannot be later than the effective date of the settlement agreement.
- B. Award back wages from the rescinded termination date to the return to work date or the new termination date. Wages must be paid as if the employee had been continuously employed throughout the disputed period. The settlement agreement may direct that back wages paid be offset by amounts earned from other sources as well as identify a period of unpaid suspension. See Subchapter 1304.

1304 Earnings Offset

The following procedures are followed when back wage payments are offset due to earnings from other sources:

- A. If the settlement agreement directs that the back wage payment first be reduced by amounts earned from non-WRS sources, the Department shall determine the earnings to be credited in each annual earnings period based on the unreduced amount, subject to the limitations in Section 415 of the Internal Revenue Code (IRC).

EXAMPLE: An employee who normally earns \$12 per hour in a full-time position (\$480 per week) works half time in another position not covered under WRS for \$10 per hour during the dispute. In each week, the employee earns \$200 for 20 hours of service working half time. If the employee is made whole for wages and receives back wages of \$280 per week (the offset amount) for the disputed period, the employee will receive WRS credit for \$480 and 40 hours of service per week because the unreduced amount is within the IRC limitations. This may not be the case in all instances.

NOTE: An acceptable settlement agreement will indicate what the employee would have earned if not terminated, any amounts to be offset and the amounts to be paid as back wages to the employee.

- B. If the settlement agreement directs that the back wage payment first be reduced by amounts earned from other WRS participating employment, the Department shall determine the earnings to be credited in each annual earnings period based on the reduced amount.

EXAMPLE: An employee who normally earns \$12 per hour in a full-time position (\$480 per week) works half time in another WRS participating position for \$10 per hour during the dispute. In each week, the employee earns \$200 and 20 hours of service working half time. If the employee is made whole for wages and receives back wages of \$480 per week for the disputed period, the employee will receive retirement credit for only an additional \$280 in earnings and an additional 20 hours of service for each week.

If the employee's WRS participating employment during the disputed period was part-time, the Department may credit additional earnings and service if the employee submits satisfactory evidence showing that the total earnings and service credited during the dispute would have been greater than those prevailing before the dispute.

1305 Payments Not Reportable to WRS

The following payments will not be considered WRS reportable earnings as provided in ETF 20.12 (5):

- A. Any payments for damages, attorney fees, interest, or penalties resulting from the settlement agreement.
- B. A payment that results from an employer's failure to hire a person. This does not exclude wages related to failure to promote an employee, if the employee's basic pay rate is permanently increased.
- C. Earnings that exceed those normally earned in an equivalent earnings period. The intent of the settlement agreement is not to artificially inflate earnings that would have been reported to WRS if there had not been a dispute.
- D. A payment not directed to the applicable earnings period.
- E. A payment for actual or constructive services rendered or deemed to have been rendered after termination of employment.
- F. Any payment that is excluded under Wis. Stat. § 40.02 (22) (b). See Subchapter 406 for details.
- G. A payment made to an annuitant unless there is a proper reinstatement.

1306 Examples of Settlement Agreements

Case 1:

Plaintiff grieved his failure to be hired at a State Agency. The State Agency succeeded in persuading the Personnel Commission that it need not hire him, but rather make a cash award settlement.

Settlement:

\$19,000 cash award.

Question:

Does this payment represent "WRS reportable earnings?"

Answer:

No. It is a payment resulting from a failure to hire or promote.

Case 2:

Plaintiff filed suit in U.S. District Court as well as a complaint with the Personnel Commission alleging discrimination during her employment and in the termination of her employment by State Agency A. To avoid litigation, the state and the plaintiff reached a settlement agreement.

Settlement:

The state pays \$90,000 “in gross wages” to the plaintiff “less any amounts required to be deducted by law or administrative regulation.” \$50,000 in attorney’s fees were also paid. The settlement specifically states that neither the plaintiff nor the defendant admits any wrongdoing. The plaintiff retains three years’ reinstatement rights, but agrees not to seek work at State Agency A and agrees to submit a letter of resignation.

Question:

Does this payment represent “WRS reportable earnings?”

Answer:

No. The plaintiff was not offered reemployment and resignation was a part of the settlement. It is not clear how the settlement arrived at the \$90,000 figure or for what years the payment is made. Also, attorney’s fees are not WRS reportable.

Case 3:

Five-day suspension is changed to a letter of reprimand. The employee gets five days pay minus all normal and customary deductions.

Question:

Does this payment represent “WRS reportable earnings?”

Answer:

Yes. If settled in the current year, the employer must include the earnings and hours on their annual report. If settled for a prior year, the employer must submit an appropriately coded transaction report (action code 22) to ETF. A copy of the settlement agreement need not accompany the report because the award is less than 80 hours of pay.

Case 4:

Participating employee is discharged and grieves the discharge.

Settlement:

The discharge is withdrawn. The employer is ordered to pay back wages from the date of the discharge to the date of the settlement agreement. The employer is also ordered to place the grievant on an unpaid leave of absence beginning with the date the settlement agreement is reached until the grievant is brought back to work into the first available position. The order states the amount of earnings and hours for the annual earnings period.

Question:

Does this payment represent “WRS reportable earnings?”

Answer:

Yes. The employer is ordered to pay the employee wages from the rescinded termination and those wages may identify a period of suspension for which wages are not paid. The settlement also specifies the hours of service and wages for each annual earnings period.

Case 5: Participating employee is discharged and grieves the discharge.

Settlement:

The settlement agreement provides that the employee will not return to work but the employer is to “deem” service and earnings from the date of discharge to some future date.

Question:

Can the employer pay contributions to WRS for the period of deemed service and earnings?

Answer:

Contributions paid on deemed service and earnings is not permissible in these cases.

1307 Settlement Agreement Guidelines

The following conditions must be met for payments made under a settlement agreement to be treated as earnings for WRS purposes. These guidelines are not all inclusive of the rule. You must refer to the rule for details.

Wis. Admin. Code	Requirement	Meets	Does Not Meet	Comment:
ETF 20.12 (4) (a)	<p>The payment is for one of the following:</p> <ol style="list-style-type: none"> 1. Retroactive wages for an expunged termination, OR 2. Retroactive wages for an involuntary suspension or leave, OR 3. Additional wages due for hours of service previously reported, OR 4. Additional wages for hours of service not previously reported. <p>NOTE: Wages must be considered WRS earnings to be reportable. Refer to Wis. Admin. Code ETF 20.12 (5), (6) and Wis. Stat. § 40.02 (22) (a) and (b).</p>			<p>If the payment made as a result of the settlement agreement is not one of these types, do not proceed any further as the settlement agreement will not be accepted by ETF.</p> <p>If the payment made as a result of the settlement agreement is one of these types, proceed to the next requirement.</p>
ETF 20.12 (4) (b)	The member or former member is living at the time of the effective date of the settlement agreement.			<p>If the member is not living on the effective date of the settlement agreement, it will not be accepted by ETF.</p> <p>If the member is living on the effective date of the settlement agreement, proceed to the next requirement.</p>
ETF 20.12 (4) (c)	The settlement agreement must be written and signed and dated by the issuing authority or by parties to the agreement.			<p>If the settlement agreement does not meet all of these requirements, it will be rejected by ETF.</p> <p>If the settlement agreement is written, signed and dated by the issuing authority or by parties to the agreement, proceed to the next requirement.</p>
ETF 20.12 (4) (d) and ETF 20.12 (8)	The settlement agreement specifies the wages to be paid for each annual earnings period and the associated hours.			If the settlement agreement does not meet this requirement, it will be rejected by ETF.

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Wis. Admin. Code	Requirement	Meets	Does Not Meet	Comment:
				If the settlement agreement specifies the wages to be paid along with the associated hours of service, and the associated hours are indicated for each annual earnings period, proceed to the next requirement.
ETF 20.12 (4) (e)	The employer must report the WRS earnings and hours of service according to WRS reporting requirements (i.e., <i>Employee Transaction Report</i> , ET-2533).			Once the settlement agreement is finalized, the employer must complete and submit to ETF the necessary transaction report forms to report the WRS reportable earnings and service for each calendar year. NOTE: The annual earnings period is fiscal year for teachers, judges, and educational support personnel.
ETF 20.12 (4) (g)	The employer must remit required contributions on wages (or that portion of wages) which ETF treats as earnings including interest computed under Wis. Stat. § 40.06 (5).			If the retroactive wages in the final settlement agreement meet the provisions of ETF 20.12 to be included as WRS earnings, ETF will prepare an invoice based on the employer's report required under 20.12 (4) (e). The invoice will indicate the amount due from the employer for employee contributions, and associated interest, and employer contributions, and associated interest. The employer is required to pay the entire amount due to ETF upon receipt of the invoice. The employer may then collect from the employee the amount the employee would have paid for the employee's share of contributions (if any) had the employee not been terminated and the employee's share of interest. NOTE: The employee may not pay any portion of the employer's contribution or employer's interest. (See Wis. Stat. § 40.05).
ETF 20.12 (4) (h)	If the remedy includes payment of wages for a period following a disputed termination of participating employment, the settlement agreement does all of the following:			If the settlement agreement does not direct the employer to pay the full back wages (less applicable offsets),

Wis. Admin. Code	Requirement	Meets	Does Not Meet	Comment:
	<p>Directs the employer to rescind the termination date and, if employee is not reinstated, gives the employee a new termination date, which cannot be later than the effective date of the settlement agreement.</p> <p>Directs the employer to pay all wages from the rescinded termination date to the return to work date or new termination date (as though the employee had been continuously working). The settlement agreement may reduce wages by amounts earned from other sources and may identify a period of suspension for which wages are not paid.</p> <p>NOTE: If the settlement agreement directs that wages to be paid be offset by other sources during the disputed period, see ETF 20.12 (7) and (10).</p>			the payment is not WRS reportable.

1308 Additional Contributions

Employees can receive additional contributions resulting from the settlement agreement. However, if the additional contributions exceed the limits on contributions defined in Section 415 of the Internal Revenue Code, ETF will provide refunds to employees or credits to employers of the excess contributions, regardless of the terms of the settlement agreement.

ETF can provide estimated amounts of additional contributions necessary to fund a benefit equivalent to a hypothetical WRS benefit to either employers or employees.

1309 Insurance Coverage

An employee contesting termination should be encouraged to take advantage of insurance continuation options and include any alleged lost insurance benefits as part of the employee's damage claim against the employer.

Retroactive reinstatement of coverage under any of the group insurance plans is not provided. Participants who are not reinstated to participating employment cannot obtain coverage resulting from the settlement agreement.

There are three insurance coverage scenarios that can occur:

1. Employee is reinstated into participating employment and coverage lapsed in the interim.

- An employee whose group health insurance, income continuation insurance, or group life insurance coverage under Wis. Stat. §§ 40.03 (6) (b), 40.51, 40.61, or 40.70, lapsed in the interim may enroll:
 - Only for the insurance plans and coverage in which the employee participated on the date of the disputed termination, and
 - For any plan or coverage for which the employee is otherwise eligible and that the employer first offered during the disputed termination.

- The effective date of the insurance enrollment is determined as if the employee were rehired on the date of the reinstatement. Insurance coverage becomes effective the first of the month following the employer's receipt of the application. Applications must be returned to the employer within 30 days of reinstatement (return to work).

2. Employee is reinstated into participating employment and had continued coverage while grieving the discharge.

- Coverage can be continued during the appeal process with premium payments submitted through the employer. The employee pays both the employee and employer share of the premium until the employee is reinstated.
- The employer should reimburse the employee for the employer share of the premiums if the employee's account is reestablished.
- No application is required since coverage never lapsed.

3. Employee is not reinstated and had continued coverage while grieving the discharge.

- Insurance is terminated the last day of the month in which the settlement agreement becomes final.
- Offer employee health and life insurance continuation coverage if applicable.

1310 ETF Procedure Upon Receipt of the Settlement Agreement and Employee Transaction Report

If the settlement agreement meets the conditions of ETF 20.12 and payments made as a result of the settlement are determined to be reportable for WRS purposes, ETF will:

1. Reactivate the employee's WRS account by removing the disputed termination, if there had been a disputed termination.
2. Compute the total of any benefit payments (separation or WRS annuity) the employee received after the termination date. See Subchapter 1312 for details.
3. Compute the total WRS contributions and interest due based on the calendar year back wages paid as a result of the settlement agreement and reported on the *Employee Transaction Report* (ET-2533).
4. Invoice the employer for 2 and 3, above.
5. Credit the employee's WRS account with earnings, contributions and service for the appropriate annual earnings period(s) retroactive to the expunged termination date.

<p>NOTE: The net effect is that the employee is treated as though never terminated.</p>

1311 Reporting the Settlement Agreement and Remitting Contributions to ETF

Employers must submit a settlement agreement to ETF within 90 days of the settlement effective date. If this is not done, the employee, collective bargaining unit, or the issuing authority may submit the settlement agreement to ETF. ETF will then contact you to request proper reporting.

If the settlement agreement impacts current year earnings, pay the full amount of WRS current year contributions with the next remittance report due after the effective date of the employee's settlement agreement. For instructions contact the Employer Communication Center at (608) 264-7900 for reporting details.

If the settlement agreement impacts prior year earnings, ETF will prepare an invoice based on the earnings reported. The invoice will include amounts due from the employer for employer contributions, employee contributions, employer interest, and employee interest. See Chapter 10 for reporting requirements.

1312 Employer Recovery of Benefits Paid

If the participant being reinstated received a benefit after being discharged, the full amount of the benefit paid is to be repaid to the WRS by the employer. ETF will invoice the employer for the amount due.

The employer may deduct from any payment due the employee resulting from the settlement agreement the benefit amount repaid by the employer. If that amount is insufficient, the balance can be deducted from the employee's future earnings. The amount deducted from each earnings payment may not be less than 10% nor more than 25% of the employee's earnings payment. The employer may charge the employee interest at a rate not in excess of the current year's assumed rate on any amount unpaid at the end of the calendar year after the year of reinstatement.

If the employee terminates employment, the employer must notify ETF of the benefit amount not yet recouped from the employee, including any interest due, at the same time it notifies ETF of the termination of employment. ETF will repay the employer the balance not recouped. ETF will then withhold that amount from the participant's future WRS benefit.

Refer to Wis. Stat. § 40.25 (5) (b) for employer recovery of benefits paid.